

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY NEVERS,

Defendant-Appellant.

UNPUBLISHED
December 4, 2003

No. 227401
Wayne Circuit Court
LC No. 93-000667

ON REMAND

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

This matter is before us on remand from the Supreme Court for consideration of issues raised by defendant but not previously addressed. Defendant was convicted of involuntary manslaughter, MCL 750.321, and sentenced to seven to fifteen years imprisonment. He challenges a number of decisions by the trial court regarding sentencing and the introduction of evidence, and argues that the prosecutor engaged in misconduct that denied him a fair trial. We affirm.

Evidentiary Issues

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An error in the admission or the exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); see also MCL 769.26. Under these rules, reversal is required only if the error is prejudicial. See *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996).

Defendant first argues that the trial court improperly prohibited him from offering testimony from Lieutenant William Kucyk regarding Kucyk's review of Illinois police reports indicating that the victim, Malice Green, had a reputation and character for violence, resisting arrest, and aggressiveness toward police officers. However, defendant was allowed to present testimony of an Illinois police officer to the same effect. Through this witness, the jury was informed of Green's reputation as a fighter and of an incident in which he violently resisted arrest causing injury to an officer. Accordingly, without considering the merits of defendant's claim that Kucyk's testimony was improperly excluded, or of the prosecutor's arguments that,

for a variety of reasons, the trial court properly excluded it, we conclude that any error that may have occurred here was harmless. MCL 769.26; *Mateo, supra*.

Defendant also complains because he was prohibited from eliciting testimony from a prosecution witness, Albino Martinez, that he argues would have shown bias on the part of that witness. However, the separate record made by the trial court on this issue shows only that Martinez had been arrested and convicted following a bar fight, and that he believed he had been mistreated by the police during those events because of his testimony against defendant. As the trial court noted, that record did not establish that Martinez's testimony was the result of bias. Further, the jury was allowed to hear Martinez testify about other incidents where he was subjected to negative behavior by police, purportedly because of his testimony in this case. Any bias that might have arguably resulted against the police was thus before the jury for its consideration in weighing Martinez's testimony. Thus, again, any error that may have occurred here was harmless. MCL 769.26; *Mateo, supra*.

Defendant also claims that the trial court erred in excluding testimony regarding the autopsy of James Brooks, who arguably died from a cocaine overdose resulting from a level of drugs lower than that of Green in this case. The court rules specifically authorize the trial court to disallow relevant testimony that might be confusing or misleading to a jury. MRE 403. In light of the evidence presented below that physical reactions to cocaine differ from person to person, we do not find the trial court's decision here, i.e., to allow generalized testimony regarding this matter rather than testimony specific to other cases, to be an abuse of discretion.

Finally, defendant advances an argument regarding evidence admitted from emergency medical technicians Alberto Martinez and Scott Walsh about difficulties they had with the police following Green's death. Defendant argues that this testimony was irrelevant and improperly admitted. Even assuming that defendant is correct in this regard, however, an error in the admission of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. We have reviewed defendant's argument carefully and do not conclude that he suffered any prejudice as a result of this evidence being admitted; to the contrary, the trial court instructed the jury that the police incidents recounted were not attributable to defendant nor were they his responsibility. Certainly, defendant's argument does not show that it is more probable than not that introduction of this evidence affected the outcome of the trial or otherwise resulted in substantial injustice to him. See *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

Allegations of Prosecutorial Misconduct

Claims of prosecutorial misconduct are reviewed de novo on appeal. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test is whether the prosecutor's alleged misconduct denied defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review allegations of prosecutorial misconduct on a case-by-case basis and examine the pertinent portion of the record to evaluate a prosecutor's remarks in context, *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995), and in light of all the facts of the case, *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor's comments must also be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* Furthermore, otherwise improper

remarks by a prosecutor might not require reversal if made in response to issues the defense has raised. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant first argues that the prosecutor made improper arguments regarding the plastic gun that testimony established was at the scene of Green's death shortly after the beating. The trial court reviewed this issue on defendant's motion for a mistrial and concluded that the prosecutor had used defendant's account regarding when and where he had received the replica weapon to question his credibility. Defendant's account was naturally subject to question as defendant made admissions from which a fact-finder could infer that he had not fully complied with all police procedures in recording his confiscation of the plastic gun.¹ Accordingly, we agree with the trial court that the prosecutor did not engage in any misconduct by making this argument.

Defendant further argues that the prosecutor violated his right against compulsory self-incrimination by commenting on defendant's failure to tell his supervisor, at the scene of Green's beating, that Green had grabbed for his weapon during the struggle. However, as the prosecutor notes, this is not a case in which defendant asserted his Fifth Amendment rights, either at the scene or at trial. Instead, he testified in great detail about what occurred. Thus, he was properly subject to questioning and comments regarding how his account at trial differed from his prior statements regarding the events at issue. *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995).

Defendant also argues that the prosecutor improperly denigrated defendant and defense counsel by arguing that they manufactured evidence and lied about the events surrounding Green's death. Because defendant did not object to these allegedly improper comments, this issue has not been preserved for our review. *Schutte, supra*. Nonetheless, we have examined the record pertaining to the statements about which defendant now complains and, noting that a prosecutor may disparage the defense presented based on the evidence adduced at trial, *People v Guenther*, 188 Mich App 174, 180-181; 469 NW2d 59 (1991), and need not use the blandest possible terms to do so, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996), do not conclude that the prosecutor engaged in misconduct.

Finally, defendant argues that the prosecutor improperly engaged in "civic duty" arguments. Again, this issue did not result in any objection by defendant at trial and, therefore, is not properly preserved for review, *Schutte, supra*. In any event, to the extent that the challenged remarks might be viewed as improper, the instructions given to the jurors here that

¹ Moreover, contrary to defendant's argument, the prosecutor did not improperly shift the burden of proof by questioning the evidentiary support for defendant's account of where and when he received the plastic gun. *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999).

they should not be influenced by sympathy or prejudice were sufficient to cure any possible error. *People v Long*, 246 Mich App 582, 587-588; 633 NW2d 843 (2001).²

Sentencing

Defendant's final argument on appeal relates to the sentence imposed against him and the guidelines scoring upon which it was based. However, because defendant has fully served his sentence, no relief can be offered even if his arguments have merit; the issue is therefore moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

We affirm.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

² Because we have concluded that each of defendant's arguments regarding the prosecutor's conduct at trial are without merit, we reject defendant's claim that the cumulative effect of these errors was to deny him a fair and impartial trial.